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In the Supreme Court of the United States

No. 341.

OCTOBER TERM, 1970.

LAKEWOOD MANUFACTURING COMPANY,

Petitioner,

vs.

THE HOME INSURANCE COMPANY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioner respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 12, 1970, and (2) granting the petition, because of substantial grounds not previously presented:

I. The Court of Appeals reversed the trial court on the basis of testimony that was wholly impeached in the trial court;

II. The appraisal team used the Brunswick strike as the sole reason for disallowing petitioner's losses after the strike began, rather than evaluating its effect as an intervening factor occurring during the fire disability period. As a result, petitioner's losses from January 9 thru May 2, 1962 were disallowed, including petitioner's losses for the portion of the fire disability period which extended 25 days beyond the end of the Brunswick strike (April 6 thru May 2, 1962);

III. The appraisal team's period of loss investigation was less than the period of disability, thus denying the insured its full recovery;

IV. Decisions of this Court concerning reversal of a trial court's decision between two permissible views of the weight of the evidence are applicable to this case;

V. The decision in this case has a direct bearing on presently outstanding casualty insurance policies totalling approximately thirty-six trillion dollars;

VI. For all practical purposes, the period of disability and the period of business interruption loss must be equal to provide the contract coverage provided under business interruption policies.

I. THE COURT OF APPEALS REVERSED THE TRIAL COURT ON THE BASIS OF TESTIMONY, THAT WAS WHOLLY IMPEACHED IN THE TRIAL COURT.

The Court of Appeals stated in its Opinion of February 6, 1970 (App. 23-24):*

> "Moreover, Butler (respondents' appraiser), testified that interviews with employees of Lakewood revealed that production operations were practically normal by December, 1961."

There is nothing in the record anywhere to substantiate such alleged interviews by Butler.

Perhaps the Court of Appeals had in mind the testimony of Samuel Laderman, an accountant selected by Umpire Yoder. Laderman testified (Tr. 1st 415)** on

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* "App." references are to the Appendix to the Petition for Writ of Certiorari.

** "Tr. 1st" references are to the transcript of the first portion of the trial, commencing December 7, 1966. "Tr." references are to the second portion commencing January 15, 1968.

direct examination by respondents' counsel that "all of them" (petitioner's employees) had said that by Thanksgiving of 1961 petitioner's production equipment and facilities were running in a normal condition.

This testimony was impeached on cross-examination when Laderman, reading his own handwritten notes, testified (Tr. 1st 487) that petitioner's general foremen told him that operations were only 50% efficient as of May 2, 1962. Laderman also had sworn affidavits of petitioner's employees confirming the fact that conditions were not normal until May 2, 1962 (Tr. 1st 465-66).

By singling out the impeached testimony of Laderman, if indeed that is what they had in mind, the Court of Appeals ignored good, corroborated evidence that petitioner's fire damage was not fully restored and that operations were not normal until May 2, 1962 or later. Such evidence was provided by Umpire Yoder (Tr. 1st 201, 202), respondents' appraiser Butler (Tr. 1st 582, 596-97), petitioner's Sales Manager and Secretary (Tr. 252-53), petitioner's machine shop superintendent, (Tr. 538), master mechanic (Tr. 250) and tool crib foreman (Tr. 737-8), and petitioner's building contractor (Tr. 40).

In its Opinion, the Court of Appeals also made reference to the extent of damage to petitioner's manufacturing facilities, stating (App. 19) that:

"Little damage was done to the actual production area * * *"

This reference no doubt contributed to the Court of Appeals' conclusion that petitioner's losses did not extend beyond January 9, 1962. This illustrates a misapprehension of business interruption insurance, the evidence and the applicable law.

Assume a manufacturing plant has 50 production machines in a production line, and only *one* is damaged or

destroyed. If the destroyed machine were first in the line, and the work on it could not be done by any other machine, there would be a total shut down of production with only a 2% damage or destruction to production machinery. See Withers, *Business Interruption Coverage and Adjustment*, pp. 81-82.

This is analogous to petitioner's case in which unrefuted testimony proved that 50% of petitioner's work space around the machines and in the aisles was robbed from production by necessary placement of destroyed departments into 7400 square feet of undamaged portion of petitioner's plant.

Petitioner's manufacturing space was effectively reduced about 50 per cent as a result of the fire (Tr. 855-59). Before the fire petitioner had 13,463 square feet of aisles and work space around machinery. After the fire, other departments temporarily were located into the production area, thus reducing aisle and work space to 5,563 square feet (Tr. 859). This evidence never was refuted.

The Court of Appeals' reference to "little damage" implies that it completely overlooked the significance of Petitioner's office, tool and die room, tool crib, paint shop, bearing assembly and experimental rooms being crowded into the production area.

This violates the insurance contracts, which protect the *whole* business, not separate units or departments. In *Studley Box & Lumber Co. v. National Fire Ins. Co.*, 85 N.H. 96, 154 A. 337 (1931) the court allowed recovery for partial suspension of business resulting from the burning of a nearby barn used in the manufacturing process.

All of Lakewood's space was production area and was used as such, even though none of it was a barn structure such as in the *Studley Box* case.

It appears that the appraisal team and the Court of Appeals decided that whatever damage was done to the production area did not contribute to losses sustained by Lakewood after January 9, 1962, but did result in losses of $183,000 (the appraisal team award) before that date. After January 9, 1962 the appraisal team blamed the Brunswick strike, as if the Brunswick strike eliminated all of the damages that their award acknowledged existed up to that time, a completely irreconcilable and erroneous conclusion, in direct conflict with the testimony and the facts.

II. THE APPRAISAL TEAM USED THE BRUNSWICK STRIKE AS THE SOLE REASON FOR DISALLOWING PETITIONER'S LOSSES AFTER THE STRIKE BEGAN, RATHER THAN EVALUATING ITS EFFECT AS AN INTERVENING FACTOR OCCURRING DURING THE FIRE DISABILITY PERIOD. AS A RESULT, PETITIONER'S LOSSES FROM JANUARY 9 THRU MAY 2, 1962 WERE DISALLOWED, INCLUDING PETITIONER'S LOSSES FOR THE PORTION OF THE FIRE DISABILITY PERIOD WHICH EXTENDED 25 DAYS BEYOND THE END OF THE BRUNSWICK STRIKE (APRIL 6 THRU MAY 2, 1962).

The appraisal award, after determining a seven month period of disability to petitioner's facilities, stated that "the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962, and that this fact must be taken into consideration in the determination of the actual cash value of the loss sustained by Lakewood."

The District Court also gave due consideration to the strike but on a rational basis.

The appraisal did not use the intervening factor of the strike as a *principal* reason for the decrease, it used

the strike as the *only* reason for denying petitioner all potential earnings after January 9th.

Although both the appraisal duo and the District Court gave consideration to the effect of the strike, there was nearly a $100,000 difference between their final determinations.

The reason is quite obvious. The District Court exercised sound judgment as to the effect of the strike, while the appraisal duo used a theory called illogical blundering.

First, the disability of facilities existed for the period from October 3rd to May 2nd. The strike lasted from January 9th to April 6th.

Second, using the Brunswick strike as a principal reason for allowing Lakewood no potential production and no earnings for the duration of the disability period, is to deliberately ignore the fact that Lakewood *had orders on their books from customers other than Brunswick who were* **not** *on strike* (Tr. 1st 299). Further, the umpire allowed no potential production and no earnings for new orders which Lakewood would have acquired had there been no fire (Tr. 892, 893).

If the strike was the principal reason for denying Lakewood potential earnings on potential production, then when the strike ended, the strike was no longer *valid* as a reason for denying Lakewood earnings from production. The Brunswick strike ended on April 8, 1962 (Tr. 1st 150), 25 days before the period of disability ended on May 2, 1962.

Despite the fact, the appraisal refused to recognize actual or probable production or earnings for the period from April 8th to the end of the disability period, May 2nd.

This denial of production and earnings and payroll expenses flies in the face of actual fact that during the period from Jan. 9th to May 2nd, petitioner: (1) Produced $759,000 of goods for all its customers (Tr. 1st 226-27); (2) Produced $331,000 of goods for Brunswick (App. 73); (3) Continued to maintain a work force during the entire period; (4) Continued to rebuild the plant, and relocated departments and replaced plant and office equipment which was damaged; (5) Had $600,000 in producible orders on its books from customers *other than Brunswick* (Tr. 1st 299); (6) Had $1,200,000 of Brunswick orders on its books which it could have produced, but for the fire (Tr. 1st. 150; 162).

The total incompetence of the umpire is demonstrated by the statement, "I didn't try to figure the potential production (after January 9)" (Tr. 1st 299) although admitting inefficiencies existed during February, March and April, 1964 (Tr. 1st 233, 234).

The insurance appraiser also admitted inefficiencies and potential production existed beyond January 9 (Tr. 1st 596-600).

The umpire's accountant admitted that petitioner's employees stated the plant was only 50% efficient until May, 1962 (Tr. 1st 487).

Everyone agrees that fire disability existed during the entire period but only part of the period was computed. Any reduction in the use of business property by the fire causing disruption, disability or dislocation of business operations must be investigated so actual loss sustained can be properly determined.

In this respect the appraisal is a total failure.

When the appraisal was put to the test of a trial, of course, those who created the monstrosity attempted to justify their position by any means at hand.

One method was to use the strike as a complete smothering of the fire effects. Certainly at the very most the strike can only be a happening, not related to the fire, that came into being during the period that the business property was disabled. The strike can have no bearing on the *period* of liability (interruption). It could only be considered, as the District Court did, on how it affected the *amount* of liability (damages).

The appraisal is designed to measure what the insured's earnings would have been if there had been no destruction or damage to the insured's property for that period of time it takes to restore such damaged business property to a point where the insured has the same use of that property as it had prior to the catastrophe.

The Court of Appeals in their decision said (App. 23):

> "The umpire and appraiser *based their* determination *largely* on the fact that in the three months immediately after the fire Lakewood produced at a rate well in excess of $300,000. sales value, whereas the sales value of production dropped significantly during the three months of the Brunswick strike, reaching a low of $72,000 in March, 1962; then, in April, the month the strike ended, sales value of production increased to more than $350,000." (Emphasis added.)

Petitioner's insurance policy states:

> "In determining Gross Earnings due consideration shall be given to the experience of the business before the date of damage or destruction and the *probable* experience thereafter had no (fire) loss occurred."

The appraisal failed to follow this basic premise. Beyond January 9th, the appraisal only considered the *actual experience of a disabled plant* but never considered the *probable experience of that plant if no fire had occurred. The protection afforded by the policy is the*

difference between actual experience and probable experience.

Without that requirement no protection exists, no business interruption policy has any meaning.

The District Court followed this principle that petitioner had the right under the policy to have a determination of its *probable* result versus its *actual* result.

Hawkinson Tread Tire Service Co. v. Indiana Lumbermen's Mutual Ins. Co., 362 Mo. 823, 245 S.W.2d 24 (1951), for example, showed that the court based the loss on the time it would have taken to rebuild the destroyed plant rather than on the shorter time it took actually to resume operations at a new location. Here the court followed the concept of the contract that the loss must be computed on what the insured would *probably* do, not on what it *actually* did.

In the *General Ins. Co. v. Pathfinder Petroleum Co.*, 145 F.2d 368 (9th Cir., 1944), cert. denied 324 U.S. 844 (1944), the court reversed a judgment for the insurer on the ground the insured was entitled to recover earnings from a plant which was contemplated to be built but was not built. The court in this case rejected what *actually* was done and substituted what *probably* would have been done had no fire occurred. This again is within the terms of the insurance contract.

Anchor Toy Corp. v. American Eagle Fire Ins. Co., 155 N.Y.S.2d 600 (Sup. Ct., 1956) held that where the insured abandoned plans to replace its damaged plant by purchasing another, and did not rebuild the destroyed plant, the period of time for liability for loss was the period of time which would have been required to replace the destroyed plant and not even an exact duplicate. No plant was ever built or purchased but the disability period

was set at 48 weeks which the Court decided was the time required with due diligence and dispatch to rebuild or replace the plant. Here again is confirmation that a loss determination must be based on what the insured *would probably* do had no fire occurred rather than what he *actually* did in face of a fire.

This is in line with the general principle.

The umpire and insurance appraiser had ample evidence as to the probable experience of petitioner during the Brunswick strike by viewing what other suppliers of Brunswick actually did during the strike period.

Otis Elevator Co. and Alcoa, both of which had Brunswick orders, continued to produce Brunswick parts during the full period of the strike (Tr. 888; Tr. 1045-47). Also a vice-president of Brunswick testified that petitioner had a right to produce during the strike at protected prices (Tr. 1st 150).

Looking at the actual experience of similar businesses not disabled for a projection of probable experience of the insured was established in *Hutchings v. Caledonian Ins. Co.*, 52 F.2d 744 (D., S. Car., 1931).

Unrefuted testimony of successful businessmen as to what they would have done under similar circumstances also was available.

Mr. Bernard Raimer, a manufacturing businessman, testified specifically (Tr. 1203, 1204) as follows:

> "Q. About the question I asked you. Well, let me break it up into two parts. First, ignoring the effects of the fire just take the hypothetical facts I gave you. You have a major customer who takes most of your goods. That customer goes on strike. You still have production orders sufficient to run for two or three months.
>
> The customer does not cut back the production orders. You have adequate capital available so you

can run, run at a reasonable profit and stockpile.

Now, under those circumstances, do you have an opinion as to whether a reasonable prudent businessman would or would not run production?

A. Absolutely—

Q. No. First, do you have an opinion?

A. Yes, sir.

Q. All right. Now, what is your opinion?

A. Well, under those circumstances any businessman that has that work on his schedule, in order for the simple fact of survival, *he has to run.*

Q. All right. Now, assume the facts as to the fire, and assume this businessman finds that when he does run he is running at a loss and he doesn't have to run to meet a shipping schedule.

Do you have an opinion under those circumstances?

A. You say he does *not have* to run to meet a shipping schedule?

Q. That's right.

A. On that basis, I believe any businessman would attempt to *cut back as much* as he can to minimize his losses.

Q. And how does a businessman do that?

A. To cut back?

Q. Yes.

A. Well, obviously, he would attempt to reduce his force by layoff, still keeping in mind that he would have to run to some degree to maintain his experienced help, which is expensive to train, especially in the precision line that we work in." (Emphasis added.)

Mr. Earl Danielson, a businessman, when asked a hypothetical question as to what he would have done had he been in Lakewood's position with the Brunswick strike, *but no fire*, answered as follows (Tr. 1100, 1101):

"A. My opinion would be any prudent manufacturer would, if he had bona fide purchase orders

from a reputable company, would manufacture during the strike of this company.

Q. And what are the reasons for that opinion?

A. Well, for one thing, it takes some time to work up to the point where you have an order on the books, and as long as they are bona fide orders and you know that eventually you are going to get your money, why, we would go ahead and produce. And I think anybody would do this on the same basis, unless they had received a letter to the contrary that 'You do not abide by this schedule.' "

Now, when asked a second hypothetical question which covered what a prudent businessman, in his opinion, would have done had he been in Lakewood's position faced with the Brunswick strike but *disabled by a fire* and finds he is losing money (Tr. 1109), he answers:

"A. If I were under the same circumstances of having a strike and *having a fire*, and I was losing money, and I had a schedule to meet, I would cut my work force down, and in order to do this, to keep from losing key people, I would cut their hours down until I could recoup my losses, and this is the way I would operate my plant.

Q. Well, if you weren't afraid of losing key people, does that mean you would close completely if you were losing money?

A. Yes, I would.

Q. I take it then you would operate on a partial basis, as a reasonable man, to keep your key people.

A. 'Yes.' " (Emphasis added.)

Another implication is made by respondents and the Court of Appeals by the following

"Despite the fire, petitioner continued to manufacture at a high rate of production until January 9, 1962, when a strike occurred at the plant of its primary customer, the Brunswick Corporation." (Brief of Respondents in Opposition, p. 2.)

The above items develop implications that Lakewood was not entitled to consideration of its loss during a portion of the strike period because:

1. There was no loss of sales;

2. Lakewood should have produced during the strike period.

The respondents' statement is not true nor is it supported by testimony. As an example, plaintiff's Exhibit 47-B and defendants' Exhibit GGGGG, show that production for the four months immediately following the fire was 35% *less* than the average production for the four months *before* the fire. The District Court after consideration of all the facts stated in its opinion (App. 34-35):

> "This defense represents what has been characterized during the course of this trial as the 'recapture theory.' This subject is considered by K. W. Withers in his book 'Business Interruption Insurance, Coverage and Adjustment' at pages 114-115 and 134 and by Henry C. Klein in 'Business Interruption Insurance' at pages 100-101. These authors appear to agree that in the case of a manufacturer who sells his goods shortly following their production, actual loss from business interruption is measurable on denied sales value of production. On the other hand a manufacturer with an excess production capacity and no ready market for his goods may only suffer a deferment of income rather than an actual loss thereof as a consequence of an interruption of his business.
>
> "Taking into account the considerations agreed upon by these authors, this Court has concluded that plaintiff suffered an actual loss of sales value of production during the period of interruption, rather than a deferral of realization thereon. The plaintiff's production was geared to an immediate ability to sell. The products were manufactured for, and on the order of, specific customers. This was not a case of manu-

facturer producing a general product on the assumption that it could thereafter be sold on the open market."

Even the umpire and insurance company appraiser agreed that petitioner had no obligation to produce during the fire and strike period at a loss. Mr. Butler testified (Tr. 1st 609-613):

"Q. Now, going generally to business interruption loss now, if a manufacturer has a fire which destroys part of his facility he is entitled, is he not, to just shut down the plant completely until he gets it rebuilt the way he wants it, or indeed he can just go out of business?

A. That is true. That is a decision the operator must make.

* * * * *

Q. Well, if he finds that in actual operating he must operate at a cash loss from day to day or week to week he is not required to do that?

A. No, sir.

* * * * *

Q. Now, if in trying to satisfy a customer he operates at a loss that would be even greater if he would shut down the plant completely. The insurance company doesn't pay for the loss beyond the loss equal to what would happen in reality?

A. That is right.

* * * * *

Q. So he has the option of operating, but he doesn't have to operate at a cash loss and, on the other hand, he may operate at a cash loss if he elects to, but here he has to keep his losses within certain limits?

A. Yes.

Q. The limit is this gross earnings limit?

A. *This is a decision for management.*

Q. And Peplin did, in fact, operate to meet Brunswick's shipping schedule, didn't it, that is, most of the shipments in October and November to Brunswick?

A. This is my understanding.

* * * * *

Q. And your own accountant's analysis of profit and loss showed that although he did make some profit on his operations for October and November, he did run into actual loss in December, didn't he?

A. *That is correct.*

* * * * *

Q. And a further loss in January?

A. *That is correct.*

Q. Again, under the same situation, even deducting expenses that were thought to be abnormal or unreasonable, you wind up with an operating loss in January, do you not?

A. That is what the figures showed.

Q. So by the end of January, Peplin did not have to run to ship to Brunswick because Brunswick was on strike; he then had the option, did he not, whether he should continue to run at a loss or cut back on production?

A. He always had that option." (Emphasis added.)

Mr. Yoder testified (Tr. 1st, 218):

"Q. Well, Mr. Yoder, did you make any inquiry of Brunswick people as to the right of Lakewood to continue to produce under Brunswick's orders?

A. I don't think there had been any question—to answer your question, I didn't go and call on Brunswick myself, no, sir. *But I wouldn't question the right to produce for Brunswick during this period.*" (Emphasis added.)

Further is the direct examination of Mr. Yoder on Tr. 1st 213, 214:

"Q. You did have information, did you not, in fact, evidence from profit and loss statements back at that time, that Lakewood's books at the time, at least, were showing an operating loss on production?

A. We were told that.

Q. You accepted that, did you not?

A. We accepted everything.

Q. What is your interpretation of the requirements of the policy, Mr. Yoder; is a manufacturer required to operate at a loss in order to reduce loss?

* * * * *

A. I don't believe they are required to, no."

Stephen C. Peplin, Petitioner's President, testified that the primary reason Petitioner cut back operations was the fire-disabled plant:

"Q. How does the fact that the insurance companies refuse to agree to pay the $2,500 a month maximum, the failure to pay the interest—affect the conditions other than lack of working capital which you claimed in your testimony, given on direct, prevent you from operating?

A. That wasn't the *sole reason.*

Q. But you had $500,000.

A. Yes, but when you add interest to what I was already losing, therefore I just didn't think I should operate. *The primary reason was a disabled plant.* This was incidental. I used the letter to try to force some money out of these people." (Tr. 1034-35, emphasis added.)

III. THE APPRAISAL TEAM'S PERIOD OF LOSS INVESTIGATION WAS LESS THAN THE PERIOD OF DISABILITY, THUS DENYING THE INSURED ITS FULL RECOVERY.

The nature of appraisal and adjustment of a business interruption loss demands a judicial pronouncement that **the period of loss investigation must equal the period of time that is reasonable for the insured to rebuild, repair or replace the damaged property.**

The District Court stated that (App. 71):

> "If in making the award the umpire and appraisers adopted a particular theory and then did not apply the theory or rules so adopted by them in arriving at their ultimate conclusion, this would be manifest mistake and the award may be set aside."

If the appraisal team determined a certain period of disability was involved, and failed to use that period consistently throughout their loss computation, then the end result must necessarily be *somewhat different* than their initial reason and judgment. This "somewhat different" test was set forth in *Patriotic Order Sons of America Hall Association v. Hartford Fire Ins. Co.*, 305 Pa. 107, 157 A. 259, 78 A.L.R. 899 (1931), cited with approval by Respondents:

> "It must be shown that, by some error, they were so misled or deceived that they did not apply the rules which they intended to apply to the decision of the case so that upon their own theory, a mistake was made which has caused the result to be *somewhat different* from that which they had reached by their reason and judgment," (Emphasis added.)

The District Court graphically extracts the nub (App. 78, 79):

> "It is this Court's finding that the appraisal award * * * set forth that the rebuilding period of plaintiff's

plant extended from October 3, 1961 to May 2, 1962 and then failed to determine the actual loss sustained by plaintiff during this period. The award therefore is not made in accordance with the terms of the insurance contracts between the parties."

The District Court did not arrive at this last conclusion based solely upon the appraisal award which stated, "The umpire finds the period from October 3, 1961 to May 2, 1962, was a reasonable time in which to rebuild the building and to move and relocate the machinery and equipment * * *"

The District Court showed that the umpire was unequivocal as to the period of disability involved and as to the effect of that disability on production.

The District Court stated (App. 76):

"In his testimony the umpire stated that he recognized that the fire damage was not fully restored until May 2, 1962 (Tr. pp. 201, 202) and that he was aware that the rebuilding effort would interfere with production (Tr. pp. 233-235)."

The umpire was bound by the rules set forth in the policy—to determine **actual loss sustained** for that period of time that the insured's property was disabled.

How is it possible to determine the loss if one totally fails to investigate the effects upon the entire disability period involved? The insured is indemnified under the insurance contract for the loss accruing within a specified period of time, namely the time it takes to rebuild, repair or replace.

The umpire without any ambiguity, in either the written appraisal award, or in his testimony, said the disability was seven months.

Once that disability period is set, the insured must have an absolute, inviolate right to an inquiry for that damaged period.

The period of loss investigation must equal the period of time that is reasonable for the insured to rebuild, repair or replace the damaged property.

Anything less than this is defrauding the insurance consumer who will always be barred from the actual loss sustained unless the period of investigation covers that period of time for which the insured is covered.

This is essential to conform to the policy requirements. The courts have consistently set aside awards which violate this principle.

In *Aetna Insurance Co. v. Murray*, 66 F.2d 289 (10th Cir., 1933), the failure of appraisers to include in the award all of the property covered by the subject agreement rendered the award invalid.

In this case, the appraisal failed to compute the losses for the period of disability as will be shown later.

In *St. Paul Fire & Marine Ins. Co. v. Tire Clearing House*, 58 F.2d 610 (8th Cir., 1932) the court held that the award should be set aside because the appraisers and the umpire failed to follow the terms of the appraisal agreement.

In this case, the appraisal totally ignored the payroll clause in the policy.

In *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 F.2d 675 (8th Cir., 1929) the award was set aside because the appraisers had acted beyond and outside the scope of the appraisal in making the award.

The rules for the appraisal are contained in the insurance contract, drafted, priced and sold by the insurance company. At the very least, the insured has the right to rely upon the written word of the insuring agreement and expect the appraisal shall be confined within those insuring rules.

The failure of the appraisal to follow the rules obviously led eventually to ludicrous results:

1. The appraisal allowed expenses to reduce loss for seven months but only investigated the production earnings loss for 3.3 months.

2. The appraisal never determined the effect of the fire on $759,307 worth of goods produced during the disability period from January 9th to May 2nd.

The District Court recognized this horrendous blunder, by stating in its opinion (App. 77):

> "Having found the reasonable rebuilding period extended to May 2, 1962, the umpire had the obligation to determine if the plaintiff achieved a normal profit margin on the actual production of goods made during the period from January 9, 1962 through May 2, 1962. The plaintiff was entitled to a normal profit on its production during that period, and was entitled to a recovery under the insurance policies of its profit margin on actual loss during that period. The umpire in his award gave *no consideration* to these factors * * *" (emphasis added).

The 'no consideration' is evident by the umpire's testimony. It shows that there is no doubt that the intentions of the Appraisal Team were to deny Lakewood any earnings from January 9, 1962 to May 2, 1962 (Tr. 1st 226):

> "Q. What did you allow for potential production from January 9th to April 9th?
>
> A. I never computed it.
>
> Q. You allowed zero for that period, did you not, from January 9th to May 2nd?
>
> A. In the award, yes. That was all taken out. I didn't allow anything for that.
>
> Q. All right. Then can we agree, you allowed no potential production at this plant at all for the period from January 9th to May the 2nd, of 1962?

A. That is one way of interpreting it.

Q. Is it an accurate way?

A. Mathematically you can say that that is correct, sir.

Q. All right. During this same period of time if we deduct from the 278,000 actual in January, the 95,000 potential you did allow for January 2nd to 9th following, for that period from January 9 on the figures you used on actual potential would show a total of $759,250 actually produced. Do you follow the mathematics? This is the 57,278, 144,72, and 359, that totals $854,307 in the actual figures. (Note: $854,307 less $95,000 is $759,250):

A. Yes."

The flagrant abuse of 'no consideration' versus the rights under the policy is shown in graphic contrast by the testimony of the insurance appraiser Butler (Tr. 1st 596-600):

"Q. What was done with die storage after the fire?

A. Some of it was inside the plant and some of it was outside the plant.

Q. Material storage?

A. Some of it was inside and some of it was outside the plant.

Q. And in your judgment as an appraiser *did the storage of material outdoors then produce some inefficiencies?*

A. *There is no question about it.*

Q. And when office space and tool crib space and tool room space is put out into an area that up to then had been serving as an adjunct to production, *this was to introduce new inefficiencies in operating, would it not?*

A. *It would, sir.*

Q. And these inefficiencies would continue until you could properly relocate your office, tool crib and tool room, wouldn't it?

A. To a certain extent, *yes, sir.*"

On direct, Butler testified as follows (Tr. 1st 582):

> "Q. Now, on the basis of all of the information before you what did you find to be the period of interruption of Lakewood's business due to the fire which occurred on October 3, 1961?
>
> A. Well, the period of interruption which we finally agreed upon, which was the length of time which would be required with the exercise of due diligence and dispatch to repair or replace the damaged facility, was from October 3, 1962—correction, 1961, *to May 2nd*, 1962;—" (Emphasis added).

In light of the previous testimony and the signed appraisal award, the District Court had every right to determine that there was no ambiguity as to the period of interruption.

Any attempt to support the appraisal position that no losses existed after January 9th, runs one into a blind alley.

According to the appraisal report petitioner suffered losses on production at an average rate of $50,000 per month during October, November, December and up to January 9th.

Then a miracle happened. Beginning January 10th, petitioner no longer lost a single penny on production through May 2nd, despite the fact that the same work force, the same disabled facilities, and the same type of production, existed on January 9th as on January 10th through to May 2nd.

What magical fairy took away the hurt at midnight on January 9th?

Let us take this one step further. Assuming that the appraisal made a firm finding that no disability existed after January 9th. Even in these circumstances the award, for the sake of justice, would require nullification. The reason is that the testimony overwhelmingly indicated

that disabilities continued to May 2, that certain equipment such as a crane was not re-installed, that the production departments and material were not relocated into their proper locations until early May, 1962.

In view of the testimony, a firm finding that the period of disability ended January 9th would have been fraud, bias or total incompetence.

3. The appraisal allowed zero from January 9 to May 2nd for fixed charges and key employee salaries under the payroll clause in the policy, and which ran concurrently with the period of rebuilding, repairing and replacing. The payroll clause reads, "Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense to the extent necessary to resume operations of the insured with the same quality of service which existed immediately preceding the loss."

Fixed charges are insured and are collectible according to *Business Interruption Primer*, by John D. Phelan, published by Rough Notes Company, Inc., Indianapolis, Indiana, by and for the Insurance Industry, as a salesman's manual to promote the sales of business interruption insurance. Phelan states that Business Interruption insurance is advisable to own, even if a company is operating at a *loss*. On Page 22, Second Edition he says:

> "*Businessman's Question:* 'My client isn't interested in covering anything but his net profit.'
>
> "*Insurance Salesman's Answer:* 'It isn't possible to cover net profit without covering continuing expenses during the interruption. If a policy were drafted to cover new profits only, the insured would have to pay continuing expenses out of this insurance recovery and would probably wind up in the red in the process. Gross Earnings insurance, properly written, guarantees the recovery of new profits by paying

the *continuing expenses* of the business as well as the profits.' "

The conclusion is simple—there was no ambiguity—there was mistake, whether simple or manifest, that denied petitioner its contractual rights. The appraisal was properly set aside for the sake of preserving justice by the District Court.

IV. DECISIONS OF THIS COURT CONCERNING REVERSAL OF A TRIAL COURT'S DECISION BETWEEN TWO PERMISSIBLE VIEWS OF THE WEIGHT OF THE EVIDENCE ARE APPLICABLE TO THIS CASE.

The umpire found that Petitioner's period of business interruption extended to May 2, 1962, but then disallowed losses after January 9, 1962, the beginning date of the Brunswick strike.

The Court of Appeals decision upheld the umpire's conclusion. Respondents assert that *Aetna Casualty & Surety Co. v. American Surety Co.*, 64 F.2d 577 (4th Cir., 1933), and Rule 52(a), Fed. R. Civ. P., support the Court of Appeals (Brief of Respondents in Opposition, pp. 16-18).

If we assume for the purpose of argument that the award is ambiguous, the *Aetna Casualty* case applies, holding that any ambiguity in the award is to be resolved in the light of the testimony of the umpire and appraiser who signed it. The Court of Appeals improperly and in conflict with decisions of this Court failed to recognize that the District Court did consider the award "in light of the testimony of the umpire and appraiser who signed it."

The Court of Appeals reversed *on the facts*, stating that Umpire Yoder intended to terminate petitioner's period of interruption as of January 9, 1962.

The bit of testimony selected by the Court of Appeals (App. 23) in its application of the *Aetna Casualty* rule is overwhelmed by the testimony considered by the District Court. Umpire Yoder testified that petitioner's fire damage was not fully restored until May 2, 1962 (Tr. 1st 201, 202), that he was aware that rebuilding during January, February and March, 1962, would interfere with production (Tr. 1st 233) that he knew that petitioner's production, tools and materials had to be stored outside causing handling inefficiencies (Tr. 1st 192), that the presence of contractors' crews would add to the interruption (Tr. 1st 234), and that the Brunswick strike actually ended nearly one month (April 8, 1962) prior to the end of the interruption period Yoder had selected (Tr. 1st 235). Yoder further testified that he knew that petitioner's supervisory personnel worked overtime to attempt to overcome effects of the fire through March, 1962 (Tr. 1st 194) and that the earliest date petitioner's people could begin to move into the reconstructed building was March 27, 1962 (Tr. 1st 201-202.)

In direct co-ordination with all of this considerable evidence Yoder testified as follows (Tr. 1st. 202):

> "Q. All right; but so far as interruption of business facilities was concerned, did you make a finding that the period up to May 2nd was a reasonable time in which to rebuild the building and move in?
>
> A. That is right."

Comparing this to Yoder's weak, indecisive testimony selected by the Court of Appeals (App. 23) to support its reversal ("I think I do, if not directly, then indirectly"), the Court of Appeals' invasion of the trial court's function becomes very clear. As pointed out in the Petition, the Court of Appeals' notion of its review powers is in direct conflict with numerous federal authorities.

Nor can Rule 52(A) Fed. R. Civ. P. salvage the Court of Appeals' improper conclusion. Rule 52(a) permits reversal only when the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed (*United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), cited with approval by respondents), but not where the trial court has decided between "two permissible views of the weight of the evidence." *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949) at p. 342.

In *United States v. National Ass'n. of Real Estate Bds.*, 339 U.S. 485 (1950) the opinion states at 339 U.S. pp. 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations) We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

Consideration of the *entire record* of the instant case precludes a determination that the District Court's findings were clearly erroneous. In addition to portions of Umpire Yoder's testimony referred to above, additional evidence discloses that petitioner's business interruption continued beyond January 9, 1962. Brunswick's orders with petitioner were placed considerably in advance of anticipated production and delivery dates. On January 9, 1962, petitioner had on hand about $1,200,000 in Brunswick orders with release dates for purchase of raw materials, production and shipping. From other customers petitioner had approximately $156,800 in orders and received an additional $650,000 prior to May 2, 1962.

Petitioner *actually* produced $759,000 from January

9, 1962, through May 2, 1962, a time during which petitioner's production facilities still were disrupted by reason of the fire. Umpire Yoder knew all of these factors which show that although the Brunswick strike occurred during the interruption period which he determined, the effect of the strike was not to completely curtail petitioner's business on January 9, 1962.

The evidence is overwhelming that the impeding effect of the fire continued after January 9, 1962, and that the umpire and respondents' appraiser knew it but simply failed to compute it. The only evidence contra is the undisputed existence of the strike and the 15 lines of Yoder's testimony singled out by the Court of Appeals.

The District Court's finding that the award must be construed as finding an interruption period extending to May 2, 1962, and that the umpire had the obligation to determine petitioner's loss of profits between January 9, 1962 and May 2, 1962, is based upon the entire record. At the very least the finding is one of "two permissible views of the weight of the evidence."

As such, the Court of Appeals did not have the right to resolve any believed ambiguities differently than the District Court.

V. THE DECISION IN THIS CASE HAS A DIRECT BEARING ON PRESENTLY OUTSTANDING CASUALTY INSURANCE POLICIES TOTALLING APPROXIMATELY THIRTY-SIX TRILLION DOLLARS.

Application of arbitration law to all forms of fire and casualty insurance using an Appraisal Clause directly affects the potential adjustment and settlement of insured losses totalling an estimated **thirty-six trillion dollars.***

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* Computed from *Insurance Facts 1970*, Insurance Information Institute (1970), and 1969 Annual Report, F M B Companies.

Despite Respondents' assertions to the contrary, each and every case relied upon by the Court of Appeals (App. 21) deals with arbitration and not appraisal.

Baltimore & Ohio R.R. v. Stankard, 56 Ohio St. 224 (1897), dealt with arbitration proceedings with all claims to be "final and conclusive" (see Syllabus and Opinion at 56 Ohio St., p. 230).

Pfleger v. Renner, 13 Ohio App. 96 (1920), was an arbitration providing the award of the arbitrator shall be *final and conclusive*.

"The whole matter was to be submitted to the * * * arbitrator, and the parties agreed to abide by and perform and fulfill the award * * *" (13 Ohio App., p. 99) "Where parties make an agreement to arbitrate and provide that the award of the arbitrator shall be final and conclusive * * *" (13 Ohio App., p. 103).

Bates v. Pennsylvania R.R., 26 Ohio L. Abs. 114 (Ct. App., 1937) involved a railroad disability claim similar to the *Stankard* case. The defendant, a member of the railroad's Voluntary Relief Department, agreed to be bound by the Department's rules which stated that controversies "shall be submitted to the determination of the Superintendent, whose *decision shall be final and conclusive thereof*, subject to appeal to the Advisory Committee * * *" (emphasis added). The rules further provided that if there was an appeal, "* * * the decision arrived at thereon by the Advisory Committee *shall be final and conclusive upon all parties without exception or appeal.*" (emphasis added) 26 Ohio L. Abs., p. 116.

In the appraisal clause there is no agreement, express or implied, that the award shall bind the parties. It is apparent the insurance companies prefer an open-end appraisal clause in the fire policy. Otherwise, they would

have inserted the necessary binding language. This is graphically illustrated by the clauses contained in the uninsured motorist policies which typically contain the following language:

> "Such person and (the company) each agree to consider itself bound and to be bound by any award made by the arbitration pursuant to this Section."

The failure of the insurance companies to use "binding" language in the fire appraisal clause makes it obvious that they did not intend an arbitration, which would be subject to the statutory law of the State of Ohio, but rather desired the more liberal standard for appraisals.

This is further evidenced by the fact that the fire appraisal clause only pertains to a monetary evaluation rather than the complete determination of all issues contemplated and covered by arbitration machinery.

The appraisal scheme only deals with value of the items and does not contemplate the finalization of many other issues such as liability, peril insured against and myriad others.

Thus, in the final analysis the overriding question remains. Was the appraisal award: 1. The result of fraud; 2. Made without authority; 3. The result of mistake; 4. The result of manifest mistake; 5. The result of misfeasance?

If any *one* of the above was present in the award it was properly set aside by the District Court.

When the District Court found that the higher degree of manifest mistake was contained in the award, by reason of the appraisal duo failing to follow the evaluation standard after the appraisers established a standard it also automatically found that the lesser included charge of mistake was present.

The confusion in the Court of Appeals' decision arises from its sole involvement with manifest mistake and arbitration cases.

While petitioner agrees that manifest mistake is a ground for nullification, it must emphasize that it is only one of the nullification grounds. Other reasons are fraud, which is not claimed, but also misfeasance, malfeasance, made without authority, and plain, simple, ordinary, old-fashioned **mistake.**

The general rule which states every reasonable (not unreasonable) presumption will be used to sustain in the absence of fraud, misfeasance or mistake, is deliberately broad enough to permit the courts a leeway to prevent injustice. The general rule certainly does not bind a court to a concept that the court must ignore reasonableness and logic and be forced to approve and continue the injustice merely because the mistake is not so manifest that the appraiser is forced to admit he was wrong and correct it when called to his attention.

The rule must be judicially sound and if the error of the appraiser is prejudicial to the interests of a party then that mistake must be corrected despite all protestations of an ego-injured appraiser.

There are an unlimited number of cases previously cited which show that the courts have fulfilled their purpose by correcting errors where they have occurred in appraisals on the sole basis of mistake without conferring or requesting approval of the appraiser before making such a decision for justice.

The Court of Appeals has further added injustice by limiting its view to arbitration cases and then applying them to this appraisal.

The distinction and need for distinction between ap-

praisal and arbitration becomes clear with even surface analysis.

An arbitration clause is inserted in broad, far-reaching agreements which cannot contemplate the type and variety of all potential claims. Therefore there are no specific rules as to formula or how specific computations shall be made, or definitions as to various areas of investigations or the limit of that investigation. Because of the openness of arbitration, statutory rules have been passed governing the results of the arbitration.

The appraisal clause, on the other hand, is not subject to statutory regulations because the appraisal has its own specialized rules in the agreement in which it is contained. The appraisal is bound by agreement which specifically details the area of claim, the time element permitted (period of interruption), the computation requirement as to items like gross earnings, etc.

Thus, it is obvious why a difference must be maintained between the two areas of evaluation.

An insurer purchases a prepared insurance contract which for practical purposes is labeled, "Protection against a specific loss under specific conditions and regulations." When a loss occurs he relies and has a right to rely upon the specific insurance language that he will receive the **"actual loss sustained"** as determined by the insurance contract provisions, not some lesser substituted conglomeration created by a mistaken appraisal.

If the appraisal fails to conform to the policy conditions then the insurance consumer is being defrauded as surely as a food consumer who buys a can labeled crab meat but upon opening finds a can of worms.

The importance of this becomes evident when it is considered that Americans are today holding fire and

casualty policies covering them for **thirty-six trillion dollars.**

If the Courts fail to safeguard their insurance rights the insurance protection on which they rely will be nothing more than ashes in their mouths.

VI. FOR ALL PRACTICAL PURPOSES, THE PERIOD OF DISABILITY AND THE PERIOD OF BUSINESS INTERRUPTION LOSS MUST BE EQUAL TO PROVIDE THE CONTRACT COVERAGE PROVIDED UNDER BUSINESS INTERRUPTION POLICIES.

The Court of Appeals (App. 22, fn. 1) placed great reliance on the theory that a business interruption loss can be shorter, equal to, or longer than the period of disability (the reasonable period required with due diligence to rebuild, repair or replace the damaged property).

The District Court, while acknowledging this *abstract* argument, rejected it in toto since it has little or no practical application generally and had no remote application to this case.

The difference between two Federal Courts should be resolved by a Supreme Court decision since the theory strikes at the very heart of all business interruption policies, which in 1969 provided 80 billion dollars of coverage to American businessmen.

If such an abstract theory becomes cloaked with the respectability of judicial agreement, it will soon transform into a standard weapon to be used to fight the legitimate claims of a pragmatic business world.

Fortunately, to date, the theory is still relegated to the philosopher's shelf and has not been given approval by any tribunal.

Respondents attempt to advance the concept by citing two cases, neither of which offer a scintilla of support.

Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co., 360 F.2d 531 (8th Cir., 1966), states that 33 days was a reasonable time to rebuild the disabled facilities and then proceeded to determine that the insured suffered a loss of $32,000 under the business interruption policy during that 33 day period of interruption. The court merely found that the loss was confined to expenses to reduce loss rather than a loss of production during the period. But the expenses to reduce loss were accrued during the full 33 day of suspension. Thus, the loss period was concurrent with the period of disability.

Rogers v. American Insurance Co., 338 F.2d 240 (8th Cir., 1964), does not confirm that a loss period can be shorter than the disability period. It states that the loss period cannot be *longer* than the disability period. This is in line with the insurance policy which does not permit recovery of losses, even though sustained by an insured, beyond the reasonable time to rebuild, repair or replace.

The abstract theory advanced has been repeatedly rejected by the courts.

In *Hawkinson Tire Tread Co. v. Indiana Lumbermen's Mutual Ins. Co.*, 362 Mo. 823, 245 S.W.2d 24 (1951), the court approved a computation of loss on projected operations at the site of the destroyed premises for the period of time it would have taken to rebuild rather than the shorter period within which the insured actually resumed normal operations at a new location.

In computing the loss, the length of the actual business interruption period caused by the peril insured against can never be shorter or longer than the period of disability. The insurance policy sets this limitation by stating the insurance company will indemnify the insured for **actual loss sustained** for that period of time it takes

with reasonable diligence to rebuild the damaged business property but will not be responsible for losses occurring beyond the period of disability.

Respondents attempt confusion by stating that the "* * * period of actual loss sustained due to business interruption was shorter than the length of time required to rebuild * * *" (Brief of Respondents in Opposition, p. 14).

This is a water and oil mixture.

First, there is no such thing as a "period of actual loss sustained." There is only an actual loss occurring during a period of disability.

There may be reasons arising during the period of disability which will tend to reduce the actual loss sustained but there can never be intervening factors which would cut-off the reasonable rebuilding period or eliminate the need for investigating the extent of the loss during that period of liability.

For example, if during the disability period of interruption there is a strike, then a determination is required to compute the effect of that strike, if any, on the total loss, and if such strike tended to increase the loss, then that amount must be deducted from the total loss, thus leaving an actual loss sustained resulting directly from the fire disabilities.

The appraisal failed to make this distinction, however, and overused the strike to the point that it nullified all effects of the fire on the production and earnings of petitioner.

This created an artificial base which could not be explained away. This is graphically illustrated when respondents' counsel posed a very telling question to the umpire:

"Was the reason why you did not allow for potential production after that date (January 9) because there was no interruption due to the fire after that date?" (Tr. 1st 273).

The umpire flushed, and respondents' counsel then realized the impossible burden he had created by the question and withdrew it.

The record unfortunately only indicates the umpire's answer was "No response."

The District Court comprehended fully the impossibility of reconciling the appraisal with the testimony (App. 75-76):

"The award does not state that after January 9, 1962 the plaintiff's production facilities were no longer disrupted by reason of the fire and no further loss would be sustained. The award does not state that after January 9, 1962 the plaintiff was able to operate efficiently and at a normal profit as the effects of the fire on the plaintiff's operations had terminated. The award does not state that the Brunswick strike ended the period of interruption but rather states that it must be taken into consideration in determining plaintiff's loss."

The District Court went on to say that at a minimum petitioner was entitled to a *normal profit* on its *actual* production during the period from January 9th to May 2nd, "and was entitled to a recovery under the insurance policies if its profit margin on actual production was diminished as a consequence of the fire * * * The umpire * * * gave no consideration to these factors * * *". (App. 77).

Testimony fully supports the District Court opinion. The umpire testified that fire damage existed until May 2nd. (Tr. 1st 201, 202) and that he was aware the rebuilding effort would interfere with production (Tr. 1st

233-235). Despite this the umpire never computed and allowed zero for the period from January 9th to May 2nd (Tr. 1st 226).

The credibility of the insurance appraiser is also subject to question. At one time he testified that any impediment to production was insignificant and not measurable but yet his own creation, defendant's "Exhibit YY." shows that petitioner lost $27,814 below break-even during January on production of almost $278,000 (Tr. 1st 633). Petitioner's normal profits in January should have been 10% (using the umpire's formula) of $278,000. These denied profits of $27,800 plus $27,814 losses resulted in a total loss to petitioner of $55,614 in normal earnings during January.

Petitioner had the option to operate fully, partially, or shut down completely.

The only restriction the policies placed on petitioner's operation was that by whatever method petitioner operated, its losses could not exceed those losses it would have sustained under total suspension. Withers, *Business Interruption Coverage and Adjustment* (1957), at p. 22. Petitioner fully complied with this restriction, suffering losses considerably less by partial operation than a loss of $868,000 it would have suffered under total suspension (Defendants' "Exhibit B").

Corroboration of this theory and reasons for petitioner to curtail its production to reduce its losses are found in the testimony of umpire Yoder and appraiser Butler (Tr. 1st 609-613; Tr. 1st 218).

It is obvious that the insurance appraiser did not appraise the loss but rather negotiated it for the insurance companies. This is evident in the fact he developed three appraisals during his employment by the insurance com-

panies, the first being for $66,658, the second for $156,412 and the third for $183,173.

Even respondents' attorneys concluded that the period of disability extended beyond January 9th. In the opening statement, John Gorman, respondents' counsel, stated that it was their computation that the disability period extended to February 14, 1962 (Tr. 25), nearly five weeks longer than the contrived appraisal cut-off date of January 9th.

The appraisal started out ill-conceived and ended in a disaster that is not capable of being mathematically or logically reconciled.

It appears that this appraisal was in mind when Vol. 4, *Couch On Insurance* 2d was written:

> "An award * * * may be attacked for any reason which would void a contract * * *
>
> "* * * an award based upon an unwarranted conclusion as to a material fact is invalid." Id., Sec. 50:246.
>
> "* * * an award may always be impeached for a mistake clearly appearing on its face." Id. Sec. 50:249.
>
> "An award which is erroneous because it is a mathematical impossibility will be set aside." Id. Sec. 50:251.
>
> "An award which is inconsistent and contradictory on its face if void." Id. Sec. 50:253.

CONCLUSION.

The Court of Appeals used impeached testimony of the appraisers and Mr. Laderman, and ignored unrefuted, reliable testimony of others which resulted in an improper decision based on the following erroneous conclusions:

(1) The Court concluded: "Moreover, Butler testified that interviews with employees of Lakewood revealed that production operations were practically normal by December '61."

Answer to Conclusion 1: There was no such testimony and no such interviews. On the contrary, testimony of Butler and Yoder themselves and Laderman and employees of Lakewood was to the effect that conditions were not normal at Lakewood until after May 2, 1962.

(2) The Court concluded: "* * * the sales value of production dropped significantly during the *three* months of the Brunswick strike * * *." (January, February and March.)

Answer to Conclusion 2: This is not a true statement. Unrefuted testimony showed that production in January, 1962 was *higher* by $36,000, than production in December 1961. The only significant drop in production was during February (to $144,000) and in March (to $72,000). These were the moving months when petitioner curtailed production to *prepare* to move and to *move* all of its dislocated departments to their permanent locations.

(3) The Court concluded: "* * * the fire did not impede production after January 9th * * *."

Answer to Conclusion 3: This is a statement shown to be untrue by testimony of Butler, Yoder and key employees of Lakewood.

(4) The Court concluded: "* * * any impediment to production after January 9th would have been insignificant and not measurable * * *."

Answer to Conclusion 4: Butler testified that petitioner was in the red $27,814 plus a $27,000 loss

of normal earnings, a total loss of $54,800 during January. These figures were obtained from respondent's accountant Baker. (Exhibit YY.) This certainly showed impediment to efficient production and that it was *measurable.*

(5) The Court concluded: "The umpire and appraiser based their determination largely on the fact that in the three months immediately after the fire Lakewood produced at a rate well in excess of $300,000 sales value whereas sales value of production dropped significantly during the three months of the Brunswick strike * * *."

Answer to Conclusion 5: The Court of Appeals accepted the appraisers' determination of the loss, based on what petitioner *actually* produced during January, February and March of 1962, as a measure for determining petitioner's loss. The heart of a business interruption policy is protection from loss of earnings, based on what a prudent businessman *would* probably do, *had no disability occurred.* To use the *actual* experience of an insured, after a disability occurs to measure the loss had no disability occurred, negates completely the purpose of a business interruption policy.

(6) The Court concluded: The appraisal team and the Court of Appeals used a rate of 10% of earnings on sales value of production in their award but allowed Lakewood *zero* earnings on $350,000 sales value of production in April, 1962.

Answer to Conclusion 6: Disabilities were still in existence, per the Butler-Yoder award and testimony, during April, 1962 and petitioner should have been allowed 10% earnings on $350,000 but was allowed *nothing.*

(7) The Court concluded: "(We) must also recognize and find that the strike at Brunswick was the principal cause of the decrease of the sales value of production of Lakewood from January 9, 1962 * * * *"

Answer to Conclusion 7: The appraisal team and the Court of Appeals used the theory that the strike was the principal reason for disallowing petitioner's earnings after January 9th. When the strike ended the theory could no longer be used for denying earnings to petitioner for the 25 days of the disability period during which there was no Brunswick strike (April 6, 1962 to May 2, 1962).

Other mistakes and errors have been pointed out which will become apparent to the Court. The District Court took into consideration at the first and second trial all these matters and made an award based on the facts as disclosed by the testimony. The Court of Appeals misinterpreted and misapplied the evidence and covered all mistakes and errors under an excuse that they could all be explained away as a judgment decision of the appraisal team which had to stand no matter how wrong and how unjust.

The issues involved in this case have tremendous impact on millions of American policyholders and hundreds of insurance companies.

A national clarification will establish a proper and understandable relationship between the insurers and insureds for their mutual benefit. With firm guidelines issued by the Supreme Court, it is hoped that litigation in this field of insurance will be substantially reduced.

Further, in the event of litigation, a national standard of evaluation issued by the highest court, will aid

inferior courts in developing consistent decisions which will tend to reduce the number of appeals, and more important, enhance the image of equal justice for all.

Respectfully submitted,

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Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GLENN J. SEELEY,
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